In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 578

CHARLES MANNINA,
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, FOOD MACHINERY AND CHEMICAL CORPORATION and CALIFORNIA CASUALTY INDEMNITY EXCHANGE,
Respondents.

REPLY BRIEF OF PETITIONER.

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Under the provisions of Rule 24, Subdivision 4, lest silence be construed as giving consent and in order to set the record straight, Petitioner respectfully submits this Reply Brief to the Brief for Respondent in Opposition to Petition for Writ of Certiorari.

RESPONDENT'S BRIEF PIN-POINTS PROBLEM.

The Brief filed by the Respondent Commission pin points the entire problem presented to this high Court. It sets forth in minute legal detail the ground rules under which the Industrial Accident Commission of the State of California has operated for the last quarter century, as far as hidden or invisible injuries (such as headaches, backaches or bursitis of one's bread-and-butter arm), are concerned. The Court, therefore, has the full picture from both sides.

Viewing the picture as presented by the Respondent Commission, the Court will note that there is just one thing missing from that picture—JUSTICE, and if it lacks justice, it lacks everything. As *Kant* put it: *"If justice should perish, man's existence on earth would have lost its meaning"*.

We, the Petitioner and his attorney, and the 7,000,000 California workmen on whose behalf they are fighting for justice, feel that, after a quarter of a century of stepped-up injustice in this field (ever since the Commission lost the original concept of fifty years ago, of the founders of workmen's compensation in California, that "a postal card to the Commission will bring justice to ANY injured worker"—a concept which seems to have ceased with the death of Commissioner Arthur Pillsbury, who originally laid down the ground rules for the guidance of the Commissioners and hearing Referees), the time has come to "call a spade a spade" and to try to get back to fundamentals as far as possible.

On page 28 of its Brief, the Commission boasts of a "*sound* and *realistic* basis for solution of the problem". This does not necessarily mean a "*just*" basis, the Court will note, or one which shows any charity or concern for the welfare of the 7,000,000 workmen entrusted to the Commission's care with *specific instructions* from the Legislature (page 16 of Petition) and from the People (pages 16 and 17 of Petition) to see to it, *affirmatively*, that ALL injured workmen get REAL justice, not the *negative* approach of having to be *pressured* to give even PAPER justice, which was bemoaned two thousand years ago by *Paul* (the Apostle of the Christ who taught us that love or compassion for our fellow men is the greatest force actuating mankind as distinguished from the beasts of the jungle, who devour each other) when he said, "Though I speak with the tongues of men and of angels, and have not charity" (synonymous with "love to our neighbor", according to all Bible concordances), "I am become as sounding brass or a tinkling cymbal". (*I Corinthians* 13, 1).

A VIEW OF THE COMMISSION'S "SOUND AND REALISTIC" APPROACH.

Let us, therefore, view the negative tinkling cymbal approach to justice which the Commission offers in its Brief to those workmen with hidden injuries, including your Petitioner, a justice in which all the cards in the so-called "sound and realistic basis" are stacked against the invisibly injured worker, as is evident from the following:

1. Under the system in vogue, as so delineated, the sacred functions of the Commission are, in practical effect, turned over to the insurance company doctors. They became the Commission's "*experts*" and "*evaluati*" (page 28 of Commission's Brief) the "objective and subjective findings" on the basis of their "knowledge of medicine and experience and observations in previous cases of a similar nature" (page 28). This "evaluation" is, *by law*, made the duty of the Referee as a public servant, not the hired tool of one of the litigants, whose "experience" and "observations" may be warped, not only by the guesswork involved in evaluating the subjective complaints, but by erroneous or inadequate facts, misunderstood expressions of the patient, preconceived prejudices, or even such human considerations as reluctance to antagonize the insurance carriers responsible for their large cars and swimming pools. A public servant has none of these outside considerations to sway him and he gets the injured worker's story *under oath* at the hearing and can watch his demeanor and study his reactions on the stand, especially under cross-examination or examination in explanation of moving pictures the carriers usually bring in where faking is suspected, pry into his work habits before injury and his *actual* loss of earnings because of the injury (a man earning $90.00 per week steadily, for instance, isn't likely to fake an injury to get his wages cut one-third to $30.00), whether he is borrowing money to live on, how he gets his pain pills, food for his family and house or rent payments, exactly how he got hurt and symptoms since, and can call for additional in-

formation if any phase of the facts is inadequately developed, even to welcoming the testimony of the injured man's wife and close associates as to his condition before and after injury.

Instead of this probing into the facts with an open mind to find a JUST basis for a decision that may decide the fate of the worker and his family for a decade or more, what do we find under the Commission's "sound and realistic" approach? Before the *Leo Cadotte* decision which your Petitioner's attorney obtained in 1948 (Petition page 14; Commission's brief pages 17 and 18) the general rule was: "We don't need the Applicant's testimony, as we have two or three medical reports that give us the entire picture". When Petitioner's attorney first questioned this procedure with a plain statement that "the injured worker ALONE, in these hidden injury cases, knows whether he is disabled and in pain, that the doctors aren't gods, have no occult or supernatural power to x-ray or photograph pain and so are just guessing and they know it", he was recommended by the Referee for a citation for "contumacious conduct because of his intemperate remark about the doctors". This remark is just as true today as it was twelve years ago and the attorney repeats it in this Brief to the highest Court in the land in full confidence that he won't be cited for contumacious conduct for stating this truth, which has risen again, though partially crushed to earth when a dictum only was obtained from the Appellate Court (Petition, pages 14 and 15) to the effect that there must be at least ONE PER-

CENT consideration given to the injured worker's personal testimony as against the guesses of the doctors.

This dictum of twelve years ago remains the law in California today. We seek to overturn it by a positive declaration from this high Court to the effect that it will take JUDICIAL NOTICE of the fact, *known to all mankind*, that truth is truth, that an unadulterated guess by a medical man as to something about which it is PHYSICALLY IMPOSSIBLE for him to know is just *an unadulterated guess* and thus not the *substantial* or *legal* evidence which the *law requires as a basis for sustaining a decision*.

It was the plain duty of the three insurance company doctors who ventured guesses that the worker's headaches in the instant case were "mild" or "slight" to have said in their reports: "It is PHYSICALLY IMPOSSIBLE for us to determine whether this man's headaches are mild, moderate, severe or profound, as we can't see the inside of his head, any more than we can see the inside of his stomach to ascertain if he is hungry. We cannot, therefore, in all honesty, give you an opinion or guess as to this. That would be usurping the function of a Referee, who must determine this from all the pertinent facts in the case to be brought out, under oath, in a hearing before him".

It was the affirmative misconduct of these three doctors in making the guesses they did that caused all the trouble in this case. The offense of a doctor who guessed that the man's headaches were "severe" or "profound" would be just as great, as he shouldn't be

guessing AT ALL when it is physically impossible for him to have any more basis for such a guess than any ordinary layman. We, therefore, plead with this high Court to face up with the *realities* of the situation and give the Commission a "sound and *realistic* basis" for deciding these cases, to wit, on the facts and not on guesses, which the Courts, and the Commission, must take judicial notice are something not within the realm of medical science to determine so do not constitute substantial or legal evidence. The matter should, therefore, be remanded to the Commission for further proceedings minus such illegal evidence.

2. That the Commission does not now operate on any such basis and, in effect, openly advocates guess work justice is made clear by its flat declaration (Brief, page 28) as follows: "Application of the expert's knowledge, experience and skill to the problem at hand *(intensity of pain)* would appear to provide *as sound a basis for decision* as the testimony of the claimant". Are the Justices of this high Court to go along with this specious reasoning when each one knows down deep in his heart and all the recesses of his brain that the injured worker alone, in these hidden injury cases, is the *only one* who ACTUALLY knows whether or not he has pain and that a doctor's guess as to the severity or intensity of the pain is, *at most*, only a GUESS?

Answer to this simple question is the crux of this entire case. If the answer is "yes", the Petition will, of course, be denied. If the answer is "no", a Writ will doubtless issue so that this subject may be more

fully explored, with the object in view of ultimately remanding the entire case to the Commission for proceedings that will give us justice not based on guesswork but based on more substantial evidence, the law and Constitutional guarantees.

3. The Commission further narrows the issue in this case by calling the Court's attention twice to the refusal of the tendered "independent medical examiner examination at the Commission's expense" (Brief, pages 8 and 9 and page 25). This was done deliberately to raise the issue herein presented, and have it determined, once and for all, as to the validity of guesswork or witchcraft justice. For fifteen years, Petitioner's attorney had been seeking just such a case where the Commission wanted to turn its sacred function of determining the severity of a headache over to an insurance company doctor for decision. The best test case he had been able to get previously was the *Cadotte* case referred to above, in which the Appellate Court of California ruled that the facts did not clearly establish that the Commission had gone *entirely* on the guesses of the doctors as against the facts but in a dictum indicated that *if it had*, it would have acted "*improperly*" (Petition, page 14). He felt that the Commission might, on the basis of this dictum, change its procedure and practices to the extent of going more on the facts than the guesses but soon learned that it was to continue its practice, at the all-important Referee level, of almost sole reliance, in these hidden injury cases, on the guesses of the doctors and that the Referees were to consider the dictum

as requiring only that they put the injured worker on the stand to get some superficial facts from him to protect the record while going *almost* solely on the guesses of the doctors. Then, one year later, came the declaration of the Chairman of the Los Angeles Panel (Petition, page 20) that the Commission had "NO ALTERNATIVE" but to rubber-stamp the ruling of the so-called "Independent Medical Examiner" (an expert so skilled in "evaluating" hidden injuries for many years as to be dependent on the industrial carriers for perhaps 80% of his business). The most was made of this flat Commission level declaration in case after case, before the Referees, the Commission and the Courts, but no out and out declaration was available to Petitioner's attorney of "RELIANCE" on the doctor's "OPINION" until the currently pending *Burrow* case arose (Petition, page 19). Consequently, when one of the Commissioners (who had just been appointed by the Governor and was thus not familiar with all this background of fifteen years of struggle against such substitution of an insurance company doctor for the Commissioners as the judge in the current case) suggested such a reference in this head injury case where there wasn't the slightest possibility of anything but a "guess" as to the severity of a headache, the Petitioner's attorney turned down the offer, as indicated in the Commission's Brief (pages 8 and 9 and 25), on the two grounds of (1) there being no such a person available as an "Independent Medical Examiner", for any expert in this field in San Francisco who practices more than a few years soon be-

comes beholden to the insurance carriers for much of his business and so, of course, when it comes to *pure guessing*, as was necessarily the case here, would naturally tend to guess the way his bread was buttered and (2) a "*guess is a guess*" no matter from what source and that what we needed to get real justice in this field was less, *not more*, "guess work".

This deliberate and calculated stand of your Petitioner's attorney in culminated protest to the established procedure and practices in this field is now before the bar of this high Court for adjudication. Was it right or was it wrong? Do we want justice based on facts or on guesses? Will we sanction the Commission continuing its now, in its Brief (page 28), openly admitted philosophy tending to make the Commissioners the "*triers of the guesses*" instead of the "*triers of the facts*" and encouraging its Referees to violate their Constitutional duties by doing likewise? Do we want "*averaged*" justice as here, where the Commission added its usual 5% for "subjective complaints" to the doctors' guesses of "slight" to make the rating "slight to moderate" as a sop to the injured worker and to salve their consciences just in case the doctors' guesses they rubber-stamp are wrong and injustice has been done by this guesswork system? Or do we want the **EXACT** justice the law requires and each case warrants on its own merits and on its own facts? The decision on these questions is now in the lap of the Justices of this Honorable Court and we pray that it will be favorable to the millions of workers who will suffer grave injustices in the future, along with your

Petitioner, if a "Writ Denied" decision issues, since it may be another fifteen years before such strong facts as we find here for a test case arise and an attorney is found who will donate his time and money to make an issue of the matter in the cause of abstract justice.

"COMMON SENSE" APPROACH OUTLINED.

In order that the Court may be in a position to offer to the Commission a really sound, realistic, practical, down-to-earth and common sense basis for deciding these hidden injury cases as against the Commission's theory and practice of deifying the doctors and letting them decide such cases for them, we offer here a further elaboration of the controlling California cases on the doctrine of JUDICIAL NOTICE, which, if used by the Commission and its Referees more and more, would simplify all their work in this field and give to the victims of these injuries the "*expeditious*" and "*inexpensive*", "*due process of law*" and "*equal*" JUSTICE *guaranteed* them by their flouted Federal and State Constitutions (Petition, pages 8, 15 and 16). Good common "*horse sense*" would then prevail at hearings and on appeals and reconsiderations in place of the present system of insisting on proof by medical reports, which means that the injured worker has to go before the Commission with a doctor on one side and an attorney on the other, and then not get justice in these hidden injury cases as distinguished from the visibly injured cases, since he doesn't have the money to purchase "*Impossible*" medical guess after medical guess, as the insurance carrier that collects premiums

from his employer to *protect* him has, and he can ill afford to give an attorney a slice of the small compensation needed to feed his family.

Such judicial notice would solve many Referee problems if taken of such elementary things as that no doctor on the face of the earth is in a position to gauge the severity of a headache, that the worker who hadn't had a day off for illness or disability for fifteen years prior to injury is presumed to be disabled by the injury in question under the governing case law which says that "industry takes a workman as it finds him" and "no disability from prior disease or trauma before the injury, none after", that a man with continual shooting pains down his leg or who has numerous leg collapses such as occur in around 15% (estimate of the late Dr. Ralph Ghormley, uniformly recognized as America's leading orthopedic expert after his 30 years in charge of such cases at the Mayo Clinic) of ruptured intervertebral disc cases from partially and intermittently paralyzed leg muscles stemming from nerve root involvement in his back, is in need of further medical treatments and a possible operation for removal of the offending disc if conservative treatment such as traction does not cure him. Instead, the practice has been for the Referee, even though he may have *actual* knowledge over a long period of years of such common occurrences and experiences and which have been written up time and time again in national magazines and newspapers so as to become *general knowledge*, to say, in effect: "Those are medical problems too deep for me to

fathom so if you don't have a *doctor's report* showing these things and connecting them up with the injury I'll have to throw you onto the industrial scrap heap without the operation and even without pain pills to relieve your pain pending the operation you say you need but don't have a doctor's report to prove, even though you have to watch your family starve in the process".

The cases on the doctrine of *judicial notice* which would stop all this and put some humanity back into the enforcement of this basic law for the protection of those who toil and establish the *rule of reason* that *"if the facts, plus what I can take judicial knowledge of, outweigh the guesses, the guesses go out the window"*, are as follows:

Varcoe v. Lee, 180 Cal. 338, 345; 181 Pac. 223 (1919), in which the California Supreme Court ruled as follows:

> "It may be stated generally with regard to the question as to what matters are properly of judicial cognizance that, while the power of judicial notice is to be exercised with caution, courts should take notice of whatever *is or ought to be generally known*, within the limits of their jurisdiction, *for justice does not require that courts profess to be more ignorant than the rest of mankind*. . . . The fact that the *belief is not universal, however, is not controlling, for there is scarcely any belief that is accepted by everyone*. . . . In every instance the test is whether sufficient notoriety attaches to the fact involved as to make it safe and proper to assume its existence without proof. In harmony with that view it has been said

that courts *must 'judicially recognize whatever has the requisite certainty and notoriety in every field of knowledge, in every walk of practical life'*". (Emphasis added.)

Markulics v. Maico Co., Inc., 74 C.A. 2d 66, 69; 168 Pac. 2d 35 (1946), in which the California Appellate Court stated:

> "*Judges cannot pretend to be ignorant of what is within the knowledge of most men of their jurisdictions*". (Emphasis added.)

In re Lawrence, 55 C.A. 2d 491, 497; 131 Pac. 2d 27 (1942), in which the California Appellate Court ruled:

> "*Knowledge that is generally possessed is the subject of judicial cognizance, and the courts will not shut their eyes and ears to the every-day happenings of contemporary life.*" (Emphasis added.)

A. E. Bell Corp. v. Bell View Oil Syndicate, 24 C.A. 2d 587, 597; 76 Pac. 2d 167 (1938), in which the California Appellate Court stated:

> "*Courts may also take judicial notice of matters of science and common knowledge and of the physical and economic laws governing oil and gas production*". (Emphasis added.)

Benton v. Industrial Accident Commission, 74 Cal. App. 411, 415; 240 Pac. 1021 (1925), in which the California Appellate Court held:

> "Then, too, the *Commission* may judicially notice its former decisions in the same case.

(*Sewell v. Price*, 164 Cal. 265, 273; *Harron v. Harron*, 128 Cal. 303, 305.)

"*Judicial notice is based upon convenience and expediency.*

"To take judicial notice and apply it to the decision of a case is a right which appertains to *every* court of justice, *from the lowest to the highest.* The application of the doctrine of judicial notice is not confined to courts of record. *Certain boards and special tribunals,* which are not strictly courts but which partake of their nature and the findings of which partake of the nature of judgments, *may take judicial notice of certain matters.* (23 *Cor. Jur.*, p. 172; *Anderson v. Board of Dental Examiners*, 27 Cal. App. 336; 149 Pac. 1006)". (Emphasis added.)

Harrison v. Harter, 129 Cal. App. 22, 27; 18 Pac. 2d 436 (1933), in which the *California Appellate Court* ruled:

"*Common experience*, of which *we* MUST take knowledge, teaches us that practically every automobile uses gasoline as a propelling power". (Emphasis added.)

MINOR ISSUES CLARIFIED.

So much for the main issue in this case. The minor factors may be answered succinctly as follows:

1. The failure of the Commission to rate the Petitioner for the latent and still partially present psoriasis condition, *as such*, constituted, in Petitioner's opinion, failure of due process of law in that the Commission should have taken JUDICIAL NOTICE of

the fact, known to the rest of mankind, that psoriasis which begins at the *site* of the injury and spreads *from there*, all over the body is of industrial causation and that a *questionable* cure (since psoriasis cannot in 99 cases out of 100 be cured completely and permanently and, once caused by the injury and activated into the blood stream thereby, may break out again at any time) should be ratable to at least a certain extent, especially when combined with the factor that the necessary wearing of a welder's helmet in the Petitioner's work causes a flare-up of the disease and is very apt to do so for the remainder of his life if he is ever cured of his profound headaches so as to enable him to go back to work at any time in the future, the operation for the cure of which headaches by inserting a silver plate in his skull at the site of the injury being in probable danger of reactivating the disease so as to more closely tie it into a package deal, making his return to productive labor even more problematical.

2. The doctrine of ESTOPPEL is overlooked entirely in the Commission's argument that there is no failure of due process or legerdemain of some sort to grant lifetime medical attention to the Petitioner on April 10, 1957, and again on November 25, 1958, and then deprive him of it by refusing, May 14, 1959, to assess the statutory penalty for continual refusal, *over a period of a year and a half*, to provide any medical treatment or medication whatever when the Commission's own records showed that on January 10, 1958, the Referee stated in his report: "The carrier agreed to pay and presumably has paid appli-

cant's drug bills", none of which have been paid since November 16, 1957, although photostatic copies of the bills from that date to March 28, 1958, were sent in to the carrier and a continuing notice that the "applicant is *still* being treated by Dr. Campisi for his head condition", was sent to the Commission and the carrier in an "Objection to Cessation of Temporary Disability Payments" by Petitioner's then attorney on June 12, 1957. From that day to this, *a period of two years and seven months,* there has not even been a postal card notice to the Petitioner from the carrier that he was no longer under the care of Dr. Campisi, tacitly and affirmatively recognized by *both* the carrier and the Commission as the attending physician on April 10, 1957, when the Commission ordered him paid $84.00 by the carrier and the carrier complied, in addition to promising two Referees to continue paying for the pain pills this doctor prescribed then breaking its promises.

The Commission spends two pages in its Brief (pages 23 and 24) setting forth the law giving the carrier the right to control medical payments. We have no quarrel with that law, but we do say that unless a carrier affirmatively discontinues the doctor recognized as assigned to the case by Commission order and sends the injured worker to a new one, he remains on it and that there is a failure of due process of law to make an *ex post facto* order taking him off the case by Commission decree after the services are rendered and without any notice from the carrier or the Commission that he is no longer on the case.

Since the date of that *ex post facto* order, January 10, 1958, the Petitioner has literally been screaming at the carrier and the Commission for medical treatment and medication to ease his pain pending a requested operation on his brain but deaf ears have been turned to him and even his formal petition for further relief along this line, filed October 9, 1959, was met with summary refusal as *res judicata* by the Referee, with reconsideration granted by the Commission for further study of the issues involved.

CONCLUSION.

It may be that the Commission may reopen the whole issue and right the terrible wrongs done to your Petitioner of its own accord when it realizes the full extent of the guesswork or witchcraft justice accorded him, but your Petitioner is not compelled to wait for, or take a chance on this. If he has proved failure of due process of law and equal protection of the law as to his brain injury, his psoriasis condition or his denial of medical attention that was granted and then taken away by an *ex post facto* order, he is entitled to a Writ of Certiorari against the Commission through the Courts here in California that denied him relief and he humbly prays that such relief will be granted and that it will be broad enough to include within its purview relief for his fellow workers in California and, by way of precedent, 70,000,000 throughout the nation, who may fall victims of the

same system of justice not based on the conception that right makes might.

Dated, San Jose, California,
January 7, 1960.

Respectfully submitted,

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